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IN THE
COURT OF APPEALS OF INDIANA

ARMONE NEELY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0803-CR-144
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Richard L. McCormick, Judge
Cause No. 71D01-0704-CM-3322

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Armone Neely ("Neely") appeals from his convictions for resisting law enforcement,

a Class A misdemeanor, and false informing, a Class B misdemeanor, raising the following restated issues:

I. Whether the trial court erred by denying Neely's motion to suppress evidence resulting from an investigatory stop.

II. Whether there is sufficient evidence that Neely forcibly resisted arrest to support his conviction for resisting law enforcement.

We affirm.

FACTS AND PROCEDURAL HISTORY

Officer Greg Early, of the South Bend Police Department, was on patrol in St. Joseph County when he came across two women fighting from opposite sides of the street. Ten minutes after resolving that conflict and leaving the scene, Officer Early received a complaint from dispatch involving a black Monte Carlo near the scene of the fight. The caller reported that two to three black men exited the vehicle and ran down the street.

Officer Early located the Monte Carlo described in the dispatch, and observed Neely leaning against the car. Neely began to walk at a "good, quick pace" away from the car when he saw Officer Early. *Tr*. at 9-10, 22. Officer Early ran the plate number and discovered that the Monte Carlo was registered to one of the women involved in the previous fight, and Officer Early suspected that an act of retaliation was about to occur.

Officer Early pulled his vehicle alongside Neely's location, exited, and asked Neely to stop and talk to him. Neely submitted to a pat-down search. Officer Early asked Neely several questions about his reasons for being at that location. At one point, Neely failed to respond and began looking around. When asked for identifying information, Neely repeated the questions, failed to make eye contact, and shifted his weight from side to side, ultimately

responding with a fictitious name. Officer Early suspected that Neely was going to fight or run, and grabbed him by the arm.

Neely moved the arm that Officer Early grabbed from side to side in a stiff-arm motion, then stiffened both arms, and refused to be placed under control. *Tr*. at 13. Officer Early told Neely that he was under arrest for resisting, but Neely still tried to avoid being placed in handcuffs. Another officer, who responded to the same dispatch, but who arrived after Officer Early did, grabbed Neely by the other arm while Neely continued to struggle. Neely allowed himself to be handcuffed only after Officer Early threatened to use his taser. While Neely was being placed in the police vehicle, he became belligerent and screamed profanities at the officers. At the jail, the police discovered Neely's true identity and that there was an active warrant for his arrest.

The State charged Neely with resisting law enforcement and false informing, and he was found guilty of those charges after his bench trial. The trial court sentenced Neely to concurrent 180-day terms of incarceration for his two convictions.

DISCUSSION AND DECISION

I. Motion to Suppress

Prior to trial Neely filed a motion to suppress evidence obtained during the investigatory stop. At the beginning of the bench trial, after the trial court asked if there were any preliminary matters, Neely's counsel stated that he had filed a motion to suppress, but would "argue that during the course of the trial." *Tr*. at 3.

During the course of the trial, Neely did not object to the admission of the officers' testimony about their initial investigatory stop or subsequent arrest of Neely. In fact, Neely's

counsel actively cross-examined the officers about the circumstances of the stop and the arrest. After the officers testified, the State rested. Neely's counsel then moved for a directed verdict based on the motion to suppress. The parties presented their arguments on the motion to suppress, and the trial court denied Neely's "motion to suppress." Tr. at 38.

The admission or exclusion of evidence is entrusted to the discretion of the trial court. *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004), *trans. denied.* We will reverse a trial court's decision only for an abuse of discretion. *Id*. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

Neely claims that he is challenging the trial court's ruling on his motion to suppress. However, Neely did not seek an interlocutory appeal after the denial of his motion to suppress. Neely proceeded to trial after filing his motion to suppress, did not object to the testimony, and argued his motion to suppress after the State had rested. Accordingly, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *See Packer v. State*, 800 N.E.2d 574, 578 (Ind. Ct. App. 2003), *trans. denied*.

Even where a defendant moves to suppress evidence prior to trial, he must reassert his objection at trial contemporaneously with the introduction of the evidence to preserve the error for appeal. *See Carter v. State*, 754 N.E.2d 877, 881 n.8 (Ind. 2001). To preserve a challenge to the admission of the evidence, the defendant must object each time the evidence is offered. *Jenkins v. State*, 627 N.E.2d 789, 797 (Ind. 1993). Neely has waived appellate review of this issue because he failed to preserve the alleged error for appeal.

II. "Forcibly" Resisting Arrest

Neely claims that the evidence is insufficient to sustain his conviction of resisting law enforcement. More specifically, he claims that there is insufficient evidence that he used force.

Ind. Code §35-44-3-3(a)(1) provides as follows:

> A person who knowingly or intentionally . . . forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties . . . commits resisting law enforcement, a Class A misdemeanor.

We begin our analysis by acknowledging that, "a private citizen may not use force in resisting arrest by an individual who he knows, or has reason to know is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful." *Howell v. State*, 782 N.E.2d 1066, 1067-68 (Ind. Ct. App. 2003). Additionally, we are mindful that when reviewing the sufficiency of the evidence we will not reweigh the evidence or reassess the credibility of the witnesses, but will consider only the evidence most favorable to the judgment, along with all reasonable and logical inferences to be drawn therefrom. *See Moore v. State*, 869 N.E.2d 489, 492 (Ind. Ct. App. 2007).

In *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993), the Supreme Court found that the evidence was not sufficient to support a defendant's conviction of forcibly resisting law enforcement absent any evidence of strength, power, or violence or any movement or threatening gesture directed toward the law enforcement official. Later, in *Ajabu v. State*, 704 N.E.2d 494, 495 (Ind. Ct. App. 1998), a panel of this court found that the evidence was insufficient to establish that the defendant acted forcibly, where the defendant did nothing

more than stand his ground. In *Ajabu*, the evidence of resistance was the defendant's refusal to release a flag to the police officer, twisting and turning a little as he held on to the flag. *Id.* at 496.

In *Guthrie v. State*, 720 N.E.2d 7, 9 (Ind. Ct. App. 1999), *trans. denied* (2000), a panel of this court disagreed with Guthrie's argument that he passively resisted arrest and found that sufficient evidence existed to sustain his conviction for forcibly resisting arrest. There, Guthrie was arrested and transported to lockup where he refused to exit the vehicle, and refused to stand after he was physically removed from the vehicle. Guthrie leaned back and kept his legs straight, forcing the officers to carry him to the receiving area. We held that Guthrie applied some force requiring the officers to exert force to counteract Guthrie's acts of resistance. *Id*. at 8. Likewise, in *Johnson v. State*, 833 N.E.2d 516, 518-19 (Ind. Ct. App. 2005), this court affirmed the defendant's conviction based on the defendant's acts of turning and pushing away from the officers and stiffening up when the officers attempted to place him into a transport vehicle. In *Johnson*, this court acknowledged that the definition of "forcibly resist" as defined in *Spangler*, was "moderated," or relaxed. *Id.* at 519.

In the present case, the officers testified that, after Officer Early took hold of Neely's arm, "he started to struggle. After not really throwing punches or anything, just stiffening his arms . . . ." *Tr*. at 13. Officer Early testified that, "I attempted to place him in handcuffs. He continued to struggle before we threatened use of the taser. And when we threatened the use of the taser that's when he finally allowed us to place him in handcuffs. He's a pretty big guy." *Id*. On cross-examination, Officer Early testified that Neely was "[j]ust like flaring his arms, stiffening his arms . . .And it wasn't like it was an aggressive resistance. It was more

of a passive resistance where he was just stiffening his arms and not letting himself be handcuffed." *Tr.* at 16.

The other responding officer testified that Officer Early "then placed his hand on Mr. Neely's arm, and Mr. Neely then began to basically do the stiff arm, kind of move his arm side to side and that's when I took a hold of his other arm to kind of de-escalate the situation and then he continued. And then we informed him that if he continued to resist us we were going to have to tase him . . . ." *Tr.* at 35-31.

Although *Spangler* seems to require some threatening gesture or movement toward the law enforcement officer, later cases have relaxed the definition of "forcibly." *See Johnson*, 833 N.E.2d at 519; *Guthrie*, 720 N.E.2d at 9. Those later cases have, instead, required the exertion of force by the law enforcement officer in response to, and in order to compel the arrestee's compliance with being handcuffed. In the present case, the officers had to threaten the use of a taser in order to convince Neely to submit to being handcuffed. As previously stated, "a private citizen may not use force in resisting arrest by an individual who he knows, or has reason to know is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful." *See Howell*, 782 N.E.2d at 1067-68. Furthermore, this court has held that Ind. Code §35-44-3-3 does not demand an overly strict definition of "forcibly resist." *See Johnson*, 833 N.E.2d at 519. By stiffening his arms in an effort to avoid being handcuffed, Neely used enough force in resisting arrest, to support his conviction for forcibly resisting law enforcement.

Affirmed.

VAIDIK, J., and CRONE, J., concur.